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Extrajudicial Criminal Confessions in Indiana: Changes in the Law of Admissibility

EXTRAJUDICIAL CRIMINAL CONFESSIONS IN INDIANA: CHANGES IN THE LAW OF ADMISSIBILITY

A confession is a statement made by a person charged with the commission of a crime, communicated to another person, wherein he acknowledges himself to be guilty of the offense charged and discloses the circumstances of the act or his degree of participation in it.[1] The defendant must do more than make statements which in themselves are not sufficient to convict him of the crime charged. Such statements are admissions, not confessions. An admission is a statement by the accused of pertinent facts tending, in connection with proof of other facts, to prove his guilt, whereas a confession is an acknowledgement of guilt of the crime charged.[2] Different rules of evidence are applied to admissibility of confessions and admissions. An admission is admissible in evidence against the accused even though involuntary, whereas a confession is not. For example, in *Watts v. State*[3] the Indiana Supreme Court ruled that a statement coerced from the accused which divulged the whereabouts of the murder weapon (a shotgun) was admissible. The court said: "The fact that the shotgun was found by direction of the defendant was not in itself a confession of guilt, nor could it, by itself, establish the defendant's guilt."[4] The statement of guilt must be definite and not conjectural. Where the defendant stated that it was not anyone's business if they were making home brew, the court held the statement not to be a confession because of its suppositional character.[5]

At the time of the making of the confession it is not necessary that the accused intend to confess or think he is making a confession. For example, testimony given by the accused as a witness in another case or in a coroner's inquest may be used against him as a confession.[6] Confessions may be either written or oral.[7]

The law governing the admissibility of confessions has undergone several stages in its development. Originally, at common law there were no restrictions upon the admissibility of confessions. They were admitted in evidence against the accused even though they were obtained from him by torture, threats, or promises. But in the last half of the eighteenth

1. 3 WIGMORE, EVIDENCE § 821 (3rd ed. 1940).
2. 2 WHARTON, CRIMINAL EVIDENCE § 337 (12th ed. 1955).
3. 229 Ind. 80, 95 N.E.2d 570 (1950).
4. *Id.* at 110, 95 N.E.2d at 583.
5. Shepard v. State, 220 Ind. 405, 164 N.E. 276 (1928).
6. Anderson v. State, 26 Ind. 89 (1866); Epps v. State, 102 Ind. 539, 1 N.E. 491 (1885).
7. Pearman v. State, 233 Ind. 111, 117 N.E.2d 362 (1954).

century the courts, believing confessions obtained by such means to be untrustworthy, developed rules forbidding their use as evidence, and by the nineteenth century the attitude of the courts had changed. The courts excluded confessions from evidence upon the slightest pretext.[8] At the end of the 1800's there was a swing back to a more liberal attitude toward the admissibility of confessions. This is basically the rule of the courts today; however, the pendulum has at least partially swung back the other way with the United States Supreme Court's decision in *Escobedo v. Illinois,*[9] which held that a confession is inadmissible if the accused is deprived of his right to the aid of legal counsel even though the confession is voluntary. The question is how far back the pendulum has swung.

RATIONALE FOR EXCLUDING INVOLUNTARY CONFESSIONS

Involuntary confessions are excluded because their use in evidence against the accused violates his right to procedural due process under the fourteenth amendment.[10] It is contrary to justice and due process of law to allow evidence extracted from the accused against his will to be used to convict him. There is a combination of reasons why the Supreme Court has held the use of involuntary confessions constitutes a violation of the fourteenth amendment. First, the use of such confessions violates the defendant's right against self-incrimination under the fifth amendment, which has been incorporated into the fourteenth amendment. Although no confession has yet been excluded explicitly upon this basis alone, the accused's right to remain silent which was emphasized in *Escobedo v. Illinois,*[11] appears to rest upon the right against self-incrimination. The second reason given for the exclusion of involuntary confessions is that they are as likely to be false as true.[12] This was the sole basis at common law for the exclusion of such confessions.[13] A third reason for the exclusion of involuntary confessions is to restrain police investigators from illegal conduct designed to extort confessions.[14]

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8. 3 WIGMORE, EVIDENCE § 820 (3d ed. 1940).

9. 378 U.S. 478 (1964).

10. Wallace v. State, 235 Ind. 538, 135 N.E.2d 512 (1956) quoting from the language of Watts v. Indiana, 338 U.S. 49 (1949) said that to turn the detention of the accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards is so grave an abuse of the power of arrest as to offend the safeguards of procedural due process.

11. 378 U.S. 478 (1964).

12. See, *e.g.,* Stein v. New York, 346 U.S. 156 (1953); Lisenba v. California, 314 U.S. 219 (1941).

13. 3 WIGMORE, EVIDENCE § 823 (3d ed. 1940).

14. Watts v. Indiana, 338 U.S. 49 (1949). In 338 U.S. at 55 the United States Supreme Court said: "Under our system, society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its own case, not by

The underlying basis under present law for the rejection of involuntary confessions is the inherent unfairness of using against the accused statements which he has been coerced into making. If the reliability rationale for excluding confessions were carried to its logical conclusion, any confession would be admissible if proved true or substantiated despite the fact that it is not freely given by the accused. This is clearly not the law. Due to the inherent unfairness to the accused of using a confession coerced from him, the courts will not allow an involuntary confession to be introduced in evidence even if proved true.[15] Neither is the fairness concept quite carried to its logical conclusion. Confessions obtained from the accused by trickery and deceit are generally admissible if true. However, the United States Supreme Court has given some indication that it will not uphold such confessions in the future.[16]

THE SUBJECTIVE STANDARD OF VOLUNTARINESS

Involuntary confessions are clearly inadmissible in Indiana by virtue of the following statute: "The confession of a defendant made under inducement, with all the circumstances, may be given in evidence against him, *except* when made under the influence of fear produced by threats or by intimidation or undue influence; but a confession made under inducement is not sufficient to warrant a conviction without corroborating evidence."[17] The requirement for corroborating evidence merely means that the state must prove that the crime confessed to has actually been committed. The reason for this requirement is to insure that no one is convicted upon a false confession.

The early Indiana cases applied an objective test of voluntariness which did not take into consideration the particular characteristics of the accused, such as his age, education, race, or mental traits, *etc.*, in determining his ability to resist police demands.[18] The subjective ap-

interrogation of the accused, but by evidence independently secured through skillful investigation." Also in Escobedo v. Illinois, 378 U.S. 478 (1964), the United States Supreme Court stated in 378 U.S. at 489 that "we have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the confession will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."

15. Johnson v. State, 226 Ind. 179, 78 N.E.2d 158 (1943); Rogers v. Richmond, 365 U.S. 534 (1961); Spano v. New York, 360 U.S. 315 (1959).

16. See note 61 *infra* and accompanying text.

17. IND. ANN. STAT. § 9-1607 (Burns 1956). (Emphasis added.)

18. Illustrative of this view of voluntariness in the earlier cases is Hauk v. State, 148 Ind. 238, 47 N.E. 365 (1897) in which the accused was arrested for hiring a doctor to perform an abortion upon his lover who subsequently died. The police threatened to allow a hostile mob just outside of the jail to seize the accused if he did not sign a confession, and they further informed him that if he did not sign a confession his mother and sister would be implicated in the crime and sent to jail. As a result of these pres-

proach to voluntariness first appeared in Indiana when the United States Supreme Court reviewed the case of *Watts v. State*[19] which involved intensive, prolonged questioning of the accused by relays of policemen over a period of five days in connection with a case of rape and murder. During the five days the accused was questioned continually from 11:30 P.M. until 3:00 A.M., and in the daytime he was driven about Indianapolis. This schedule allowed him little sleep. He was also given insufficient food and was kept in solitary confinement in a place called the "hole" for two days. After the sixth day, the accused signed a confession and led police to the murder weapon. The Indiana Supreme Court upheld the conviction based on this confession.[20] The court apparently adhered to an objective test of voluntariness. The United States Supreme Court reversed the conviction[21] stating in its holding that "while a statement to be voluntary need not be volunteered, it does not issue from a free choice if it is a product of a sustained pressure by the police, it being immaterial whether the accused has been subjected to a physical or mental ordeal."[22]

The Court clearly applied a subjective rather than an objective standard in ascertaining the voluntariness of the confession. After considering the cumulative effect of all the forces bearing on the accused's freedom of choice to confess, the Court concluded that his confession was not the product of a free mind even though no force or threats of force had been exerted upon him. The cumulative effect of prolonged and relentless interrogation resulting in insufficient sleep, the lack of adequate food, the two days in solitary confinement, wore down the accused's will to resist the demands of his interrogators.[23]

Although the subjective standard is the basic one for determining the voluntariness of a confession, there is a cognate test which is applied

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sures, the defendant signed a confession upon which he was convicted. The Indiana Supreme Court upheld the conviction stating that the confession was voluntary because the threats directed at the accused were not of a nature that would make him state from fear that which was false.

19. 338 U.S. 49 (1949).

20. Watts v. State, 226 Ind. 655, 82 N.E.2d 846 (1949).

21. Watts v. Indiana, 338 U.S. 49 (1949).

22. "Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary. This was a calculated endeavor to secure a confession through the pressure of unrelenting interrogation. The very relentlessness of the interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right." *Id.* at 56.

23. This subjective criteria of voluntariness has been accepted and applied by Indiana courts ever since the Watts case. See, *e.g.*, Sutter v. State, 227 Ind. 648, 88 N.E.2d 386 (1949); Wallace v. State, 235 Ind. 538, 135 N.E.2d 512 (1956); Culombe v. Connecticut, 367 U.S. 568 (1961); Lisenba v. California, 319 U.S. 221 (1941) for the application of this test.

in special circumstances. Where the Supreme Court has found the conduct of the accused's interrogators inherently coercive, it has held that the accused's right to due process of law has been violated without examining the subjective effect of the pressures upon the individual accused. For example, in *Ashcraft v. Tennessee*[24] the accused was continually questioned by relays of police officers for thirty-six hours during which time he was allowed no rest or sleep. Without considering the actual reaction of the accused to these pressures the Court held the confession to be involuntary because of the obvious employment of coercion.[25] The Court apparently felt that such conduct by police officials would coerce a confession from any person, regardless of age, intelligence, *etc.*, and thus believed a subjective consideration of the accused's reaction to be unnecessary. Under this standard the Court may in exceptional circumstances hold a confession to be involuntary as a matter of law where the accused's will has not, in fact, been overborne because of his extraordinary stamina, *etc.* The real objective of the Court seems to be to deter flagrant abuses of police whether or not they result in an involuntary confession.[26]

In *Gallegos v. Colorado*[27] the United States Supreme Court departed from the voluntary standard in the case of an immature, youthful offender. The accused, a fourteen-year-old boy, was arrested for murder; immediately upon arrest he orally confessed to the crime. He was confined in a juvenile home for five days before he signed a confession. While there he was allowed to speak freely with the other boys and to eat his meals with them. Although prior to his confession he was not taken before a magistrate nor did he see his parents or an attorney, he was told before making the written confession that he could confer with his parents and an attorney. The Supreme Court held the confession to be inadmissible. Although the language of its decision reversing the conviction in view of the "totality of circumstances" was couched in the terminology of the subjective test of voluntariness, apparently a new

24. 322 U.S. 143 (1944).

25. "We think a situation such as that shown here is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear." *Id.* at 154. Justice Jackson criticized the majority for not determining whether the confession was in fact coerced. He objected to the majority's failure to apply the subjective test of voluntariness. *Id.* at 157 (dissenting opinion).

26. For support of this proposition see, Haynes v. Washington, 373 U.S. 503 (1963); Payne v. Arkansas, 356 U.S. 566 (1958). See, also, Stein v. New York, 346 U.S. 842 (1953) where it was stated by the court that physical violence or the threat of it invalidates the confession without regard to the actual effect of it on the will of the accused.

27. 370 U.S. 49 (1962).

standard was applied. It is doubtful that the confession in this case was involuntary under either the subjective or inherently coercive tests since there was no physical coercion, no intensive questioning, and no psychological threats. The accused freely admitted the absence of any such factors.[28] There were no questionable practices other than the illegal detention of the accused which under these circumstances was not inherently coercive.

In holding the confession inadmissible the Court emphasized the fact that the youthful accused was unaware of his constitutional rights. In the words of the Court, it was dealing with, "a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights."[29] Although there was no physical or mental coercion indicated by the evidence, the Court held the defendant's lack of knowledge and appreciation of his constitutional rights to invalidate the confession. This new standard appears to have been limited to youthful offenders through the Court's emphasis upon the youth of the accused. However, it would logically seem to follow that this standard would apply to persons of any age who are unaware or unappreciative of their right to remain silent and their right to counsel.[30]

General State of Mind of Accused as Affecting Application of Subjective Test of Voluntariness

The law presumes that an insane person can commit no rational, voluntary act; he has no capacity to make a rational decision; nor can he know of his constitutional rights. Therefore, the confession of an insane person is a nullity.[31] A confession will not be excluded on the sole ground that the accused is of low emotional or mental stability, feeble-minded, or deranged, provided he is capable of understanding the effect and meaning of his confession.[32] However, the fact that a confession will not be excluded from evidence solely upon the low mental capacity of the accused does not mean that the accused's mental state is not considered in determining whether his confession was voluntary. In applying the subjective test of voluntariness, the mental state of the accused is an important factor which is evaluated and weighed with the other circum-

28. *Id.* at 61 (dissenting opinion).
29. *Id.* at 54.
30. It appears that Escobedo v. Illinois, 378 U.S. 478 (1964) has produced this result.
31. Blackburn v. Alabama, 361 U.S. 199 (1960); People v. Shroyer, 336 Ill. 324, 168 N.E. 336 (1929); State v. Campbell, 301 Mo. 618, 257 S.W. 131 (1923).
32. Tipton v. Dickson, 355 U.S. 934 (1958).

stances present at the time of the confession in order to determine whether the confession was in reality the product of free choice.

Intoxication of an accused at the time of giving the confession will preclude it from evidence only if his drunkenness was such as to render him unaware of the implications of what he was saying or to produce in him a state of mania. A confession given in a state of intoxication of a lesser degree is admissible and the jury must consider such intoxication in ascertaining the weight to be given the confession.[33] If the intoxicated accused is cognizant of his acts his confession should be admissible provided it is otherwise voluntary. Since the accused has voluntarily put himself under the influence of alcohol, he should not be allowed to assert this as invalidating the confession unless he was in such a state of stupor as to be unable to act wilfully and rationally.

It is entirely consistent with the subjective test of voluntariness to refuse to exclude a confession on the sole ground of intoxication unless that intoxication is so extreme as to render the accused unaware of what he is saying. Although it is not apparent from the above rule, the courts undoubtedly consider intoxication of a lesser degree in determining voluntariness in the pre-trial hearing before admitting the confession to the jury. To be consistent with the subjective test of voluntariness, intoxication must initially be considered by the judge as one factor in determining whether the confession was the product of a free mind.

A confession is admissible evidence even though given while the accused was under the influence of narcotics or drugs, provided he was capable of understanding the meaning and effect of his confession,[34] and provided the drugs did not produce mania. The fact that the accused was under the influence of drugs at the time of giving the confession must be considered as one of the factors affecting the voluntary nature of the confession since they may make him more susceptible to official

33. Wells v. State, 239 Ind. 415, 158 N.E.2d 256 (1959); May v. State, 232 Ind. 523, 112 N.E.2d 439 (1953); Eiffe v. State, 226 Ind. 57, 77 N.E.2d 750 (1948); Laughlin v. State, 171 Ind. 6, 84 N.E. 756 (1908). 3 WIGMORE, EVIDENCE § 841(2) (3d ed. 1940).

In the Eiffe case, the accused, at the time of the confession, was nervous from having been drunk the previous day and was suffering from a hangover. The Court held the confession to be voluntary.

"Mania" as defined in BLACK, LAW DICTIONARY 934 (4th ed. 1951) is "that form of insanity in which the patient is subject to hallucinations and illusions, accompanied by a high state of general mental excitement, sometimes amounting to fury."

34. See, *e.g.*, U.S. *ex. rel.* Townsend v. Sain, 276 F.2d 324 (C.A. Ill. 1960); People v. Townsend, 11 Ill. 2d 30, 141 N.E.2d 729, *cert. denied,* 355 U.S. 850, *cert. denied,* 358 U.S. 887 (1958). 2 UNDERHILL, CRIMINAL EVIDENCE § 393 (5th ed. 1956); 2 WHARTON, CRIMINAL EVIDENCE § 393 (12th ed. 1955); 2 WIGMORE, EVIDENCE § 499 (3d ed. 1940).

One case has been reported in which a confession was held inadmissible because of mania produced by drugs. State v. Anderson, 247 Minn. 469, 78 N.W.2d 320 (1956).

pressures to confess. Ordinarily it is immaterial whether the drug was self-administered or given by the police. Even if the drug were administered by the police, the confession should not be inadmissible unless the drug produced mania or rendered the accused unaware of or incapable of understanding the meaning and effect of his confession. It is the effect which the drug produces upon the accused that is the determinative factor, not by whom it is administered.

An entirely different question is presented where the confession was given by a defendant while under the influence of a drug having the effect of a truth serum. Such confessions are clearly inadmissible whether or not the drug produced mania or the defendant was aware of his statement. Truth serums may induce the accused to make statements which he would not voluntarily make if not under the influence of the drug.[35] If it were not for the dubious reliability of confessions induced by the serum, confessions given by the accused while under the influence of truth serum would probably be considered admissible if he had knowingly consented to the use of such drug upon himself. However, respected authorities have stated that truth serums occasionally yield a mixture of truth, fantasy, suggestions, and sometimes lies.[36]

Confessions made by the accused under hypnosis present almost the same situation as that of truth serums. Hypnotism has been defined as a condition, artificially produced, in which the person hypnotized, apparently asleep, acts in obedience to the will of the operator.[37] The hypnotized person is extremely suggestible and usually responds in the manner indicated by his operator. Such confessions are clearly inadmissible since the accused has no volition of his own, but acts at the demand of the hypnotist. Confessions given under hypnosis have been defended on the ground that the hypnotist cannot cause his subject to make false statements. Whatever the validity of that argument may be, the truth of the confession is irrelevant since it is not voluntarily given.[38]

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35. In Townsend v. Illinois, 372 U.S. 293 (1963) where a police psychiatrist injected the accused with scopolamine on the pretext of giving him a pain-relieving drug to ease the symptoms of withdrawal from heroin, the Supreme Court stated 372 U.S. at 307: "If an individual's 'will was overborne' or if his confession was not 'the product of a rational intellect and a free will,' his confession is inadmissible. . . . These standards are equally applicable to a drug-induced statement. It is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a truth serum . . . whether scopolamine produces true confessions or false confessions, if it in fact caused Townsend to make statements, those statements were constitutionally inadmissible."

36. ROHN, POLICE DRUGS (1956); MacDonald, *Truth Serum*, 46 J. CRIM. L., C. & P.S. 259 (1955).

37. BLACK, LAW DICTIONARY 876 (4th ed. 1951).

38. In Leyra v. Denno, 347 U.S. 556 (1954) the police brought a psychiatrist to the accused identifying the former as a doctor who had brought medicine to relieve the

Negative inducements to confess are inducements such as physical force executed upon the accused, threats, deprivation of food and sleep, *etc.* Undoubtedly, all jurisdictions hold that confessions obtained by such means are involuntary and thus inadmissible. There is statutory authority in Indiana prohibiting the use of force or threats of force to obtain confessions.[39] Confessions obtained in violation of this prohibition are inadmissible regardless of whether formal charges had been filed or the accused was merely being held for investigation.[40] Confessions obtained by force or threats exerted upon the accused are clearly not voluntarily given.[41] A confession is not inadmissible merely because force or threats occurred prior to or at the time of confession. The force or threats of force must have been of such a nature and so closely related in time to the confession that they *caused* the accused to confess against his will. Nevertheless it is not necessary that the actual purpose of the threats or force exerted upon the accused be to obtain a confession.[42]

Positive inducements are promises of reward, immunity, lighter punishment, *etc.* made to the accused in exchange for a confession. The early Indiana decisions held such confessions admissible. Their position was one of strict adherence to the letter of the Indiana statute which allows confessions obtained by promises.[43] It specifies that only confessions given under fear shall be excluded. Thus, a confession was admissible against the accused even though obtained by promissory

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defendant's sinus pain. The psychiatrist hypnotized the defendant and obtained a confession from him through suggestive questioning. The United States Supreme Court held the confession to be involuntary.

39. IND. STAT. ANN. § 10-404 provides: "It shall be unlawful for any person or peace officer having in custody any person under arrest charged with the commission of a crime, to inflict upon the person so held any physical violence or threaten to inflict personal violence or deprive him of necessary food or sleep for the purpose of extorting from said person a confession that he, or some person within his knowledge, was guilty of the violation of some state or municipal law." Also, IND. STAT. ANN. § 9-1607 (Burns 1956) provides that confessions obtained by inducements are admissible unless given under the influence of fear produced by force, threats, or undue influence.

40. Sutter v. State, 227 Ind. 648, 88 N.E.2d 386 (1950).

41. The inducement statute has been largely replaced by the subjective test of voluntariness which itself makes confessions given under fear inadmissible.

42. In Johnson v. State, 226 Ind. 179, 78 N.E.2d 158 (1948) the accused, who fatally shot an Indiana state trooper, was apprehended in a wooded area by fifteen state police officers who handcuffed him with his hands behind his back and severly beat him with their fists. Then the accused was driven to state police headquarters where he confessed after interrogation. The Court held that the confession was inadmissible because it was obtained by force. The Court stated that it is irrelevant that the beating inflicted by the police was provoked by anger over the death of their comrade and not for the purpose of eliciting a confession. It also noted that the conclusion was inescapable that the confession resulted from the beating because of the closeness in time between the two.

43. IND. STAT. ANN. § 9-1607 (Burns 1956).

inducements since it was not the product of fear.[44]

However, there have been no cases in Indiana in several decades in which there has been a question of a confession obtained by promises relating to the charge.[45] What accounts for the absence of cases involving confessions obtained by promises relating to the charge? Apparently, when a confession is obtained by positive inducements the defendant is willing to receive the benefits of the promise and is reluctant to jeopardize them by proving that the confession was induced by promises. Since a plea of guilty will probably accompany the confession, the admissibility of the confession is not contested.[46] Where promises are made, they are usually attempts to induce the accused's co-defendant to give testimony against him rather than to obtain a confession from the accused.[47]

It is unlikely that Indiana would now uphold a confession obtained by promises. As early as 1884 the United States Supreme Court held that the use of such confession is violative of the due process clause of the fourteenth amendment.[48] The invalidity of such confessions has often been reiterated by the Supreme Court.[49] In *Haynes v. Washington*[50] the United States Supreme Court indicated that Washington's statute, which permits confessions obtained by promises to be used in evidence, was unconstitutional. The Washington statute involved in *Haynes* is identical to Indiana's statute. The judge in the Washington district court instructed the jury in the terms of the inducement statute telling them that they must find the confession voluntary even though given under induce-

44. Hauk v. State, 148 Ind. 238 (1897) was typical of these early cases declining to exclude a confession obtained by promises of benefit relating to the charge. In that case the defendant had been promised his freedom if he would confess and divulge the name of his accomplice. Upon the faith of his promise he signed a confession upon which he was convicted. The Supreme Court upheld the admissibility of the confession because it was not made under the influence of fear.

45. In Brown v. State, 232 Ind. 227, 111 N.E.2d 808 (1953) at the time of the defendant's arrest for kidnapping, he was also wanted for escape from the state penitentiary. He confessed to the crime of kidnapping upon the faith of promises by the policemen that he would not be prosecuted for escape from the penitentiary. The confession was held admissible even though obtained by a promise. This decision is not contrary to the almost universal rule prohibiting the use of confessions obtained by promises of benefit, since this rule is applicable only to promises which relate to the charge to which the confession pertains. Here, the promise did not relate to the charge to which the accused confessed (kidnapping), but it related to a different charge, that of escape from prison.

46. Mr. Fred Gregory, former Monroe County prosecutor for the State of Indiana, stated that in his experience he has found that promises are seldom used to obtain a confession from a defendant. Interview with Mr. Fred Gregory in Bloomington, Indiana, August 4, 1965.

47. *Ibid.*

48. Hopt v. Territory of Utah, 110 U.S. 574 (1884).

49. See, *e.g.*, Haynes v. Washington, 373 U.S. 503 (1963); Ashdown v. Utah, 357 U.S. 426 (1958); Payne v. Arkansas, 356 U.S. 560 (1958).

50. 373 U.S. 503 (1963). See also Brown v. Allen, 343 U.S. 433 (1953).

ments unless made from the influence of fear. In *dicta* the United States Supreme Court said: "It seems reasonably clear from this instruction [based on the statute] that the jury may well have been misled as to the requisite constitutional standard . . . the jury may have based its finding of guilt on the confession, reasoning under the questionable Washington statute . . . the Washington statute and the quoted instruction [based upon it] raise a serious and substantial question whether a proper constitutional standard was applied by the jury."[51]

Confessions obtained by promises of benefit are considered to be inadmissible because they are unreliable. The holding out of sufficient benefit to the accused may cause him to confess falsely to a crime. If one is accused of robbery and offered a suspended sentence or a reduction of the charge to petit larceny as an incentive for his confession, he may confess, even though he is innocent, rather than expose himself to the risk of conviction upon the charge of robbery. This was the rationale for the exclusion of such confessions at common law.[52] Promises of benefit deprive the confession of its voluntary character; where a confession is induced by promises, it is not the product of free and unconstrained choice.

The only confessions obtained by promises which are inadmissible are those induced by promises of a temporal nature relating to the charge to which the confession pertains.[53] The benefit promised must be direct and not collateral to the charge.[54] For example, where the defendant was arrested for the commission of two different crimes, escape from prison and kidnapping, a confession to the crime of kidnapping given in exchange for a promise not to prosecute him for escape from prison was admissible since the promise did not relate to the charge to which the confession pertained.[55]

It does not appear that a distinction based upon whether the promised benefit does or does not relate to the charge is valid. There is no real difference between the above example and a situation where the accused is promised a lighter sentence for the crime to which he confesses. In the above example the charge of escape from prison carried a sentence of seventeen years and the charge of kidnapping was punishable by a ten year sentence. Thus, there was a potential total sentence of twenty-seven years. The accused was promised a sentence of ten years instead of twenty-seven if he confessed to the kidnapping charge. Assuming armed

51. 373 U.S. at 518.
52. 3 WIGMORE, EVIDENCE § 834-36 (3d ed. 1940).
53. See Hopt v. Territory of Utah, 110 U.S. 574 (1884).
54. Annot., 80 A.L.R.2D 1428, 1436 (1961).
55. Brown v. State, 232 Ind. 227, 111 N.E.2d 808 (1953).

robbery carries a sentence of twenty-seven years, how does the above promise differ from one where the accused is promised a sentence of ten years on the charge of armed robbery instead of the twenty-seven years if he will confess to that crime? In both instances, the confession is induced by a promise of a reduction in the defendant's total possible sentence. The defendant is indifferent as to whether the sentence is reduced on the charge to which he confesses or on another charge. He is only concerned with the fact that by confessing he will reduce his total time in prison. He is just as likely to confess falsely to obtain a reduction in his sentence on another charge against him as he is to confess to obtain a reduction in the sentence of the charge to which his confession relates. In both situations he will be effectively deprived of his free choice. The manner in which the promised benefit reaches the accused has no relevance under the subjective test in determining the voluntariness of the confession. The sole question should be whether the benefit promised the accused was of sufficient strength to overcome his will, not whether it related to the charge to which he confessed.

CONFESSIONS OBTAINED BY FRAUD, OR TRICKERY

The general rule in the federal courts as well as Indiana is that confessions obtained by fraud or trickery are admissible unless the use of such methods is reasonably likely to procure an untrue confession or amount to mental coercion.[56] In *Lewis v. United States*[57] a police officer made a false statement to the accused as to evidence against him and falsified a photograph supposedly showing his fingerprint upon the shoe of the victim, thus tending to show the accused that the police had strong evidence of his guilt. The accused thereupon confessed. The court held that inducement of a confession by fraud or trickery does not itself render the confession inadmissible. The court reasoned that while false statements or trickery might tend to make a guilty man confess, they would not have that tendency if the man were innocent unless the statement as to the evidence was coupled with some promise or representation

56. United States *ex. rel.* Everett v. Murphy, 329 F.2d 68 (2d Cir. 1964); Caminito v. Murphy, 222 F.2d 698 (2d Cir. 1955); Jackson v. United States, 102 F. 473 (9th Cir. 1900); Schuble v. State, 226 Ind. 299, 79 N.E.2d 647 (1948).

3 WIGMORE, EVIDENCE § 841(1) (3d ed. 1940). "[T]he use of a *trick* or fraud (however reprehensible in itself) does not of itself exclude a confession induced by means of it. So far as the trick involved a promise which would tend to produce an untrue confession, it would operate to exclude,—not, however, because it was a trick (*i.e.* because the representations were false) but because even if true its tenor would have stimulated a confession irrespective of guilt."

MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE 232 (1954) "Procurement of a confession by trick or deception does not vitiate it, unless the deception is calculated to prompt the victim to confess falsely."

57. 74 F.2d 173 (9th Cir. 1934).

in regard to the advantage to be gained by the confession.

It is open to question whether the United States Supreme Court would now uphold confessions obtained by trickery or fraud as meeting the requirements of due process contained in the fourteenth amendment. The above case indicates that the basis for admitting in evidence confessions obtained by fraud or trickery is not that they are considered voluntary but that such confessions are likely to be true. An accused will probably not confess under such circumstances unless he is guilty. However, the guilt of the accused is not the overriding criterion for determining the admissibilty of confessions. It is the method by which confessions are obtained, not their reliability, which is now the determining factor.[58]

The United States Supreme Court has never clearly ruled that any confession induced by fraud or trickery will render the confession inadmissible. If the sole test for determining the admissibility of such confessions is the subjective voluntariness of the accused, it is likely that the tricks employed by the police in the *Lewis* case will not render the confession inadmissible because of the lack of any mental coercion. Although tricked, the accused's considerations in deciding to confess were not clouded by extreme emotional pressures or coercion such as a false threat to prosecute a friend as an accomplice. The facts in *Spano v. New York*[59] provide an example of mental coercion which should render the confession inadmissible under the test of subjective voluntariness. In that case, a police officer, under direction from his superior, told the accused that he would be discharged from the police force and his wife and children would suffer unless the accused confessed. Because of sympathy for his friend, the accused did confess. A conviction based on the confession was reversed because of all the surrounding circumstances, including lack of counsel. The Supreme Court later indicated that at least part of the rationale for reversing the conviction was the trickery employed by the police to elicit the confession.[60]

Subjective voluntariness, however, is no longer the sole test for the admissibility of confessions. In *Escobedo*[61] the Court held a voluntary

58. In Rogers v. Richmond, 365 U.S. 534, 541 (1961) the United States Supreme Court said: "Our decisions under that Amendment [fourteenth amendment] have made clear that convictions following the admission into evidence of an involuntary confession cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusational and not an inquisitional system. . . ."

59. 360 U.S. 315 (1959).

60. In Culombe v. Connecticut, 367 U.S. 568 (1961) the court said: "This may fall short of the crude chicanery of employing persons intimate with the accused, to play upon his emotions, that was involved in *Spano v. New York*. . . ."

61. 378 U.S. 478 (1964).

confession inadmissible because of the deprivation of the accused's right to counsel. As evidenced by that decision, the trend of the Court is toward considerations of "fair play" and police ethics in ruling upon the admissibility of a confession. The logical conclusion of this approach is a ruling that all confessions obtained by unethical police methods such as fraud and trickery are not admissible in evidence. This position is supported by *dictum* in *Lisenba v. California* in which the Court stated: "If, by fraud, collusion, trickery, and subornation of perjury, on the part of those representing the state, the trial of an accused person results in his conviction, he has been denied due process of law. *The case can stand no better if, by the same devices, a confession is procured and used in the trial.*"[62] The *dictum* of this case foreshadows a holding that all confessions obtained by fraud or trickery are inadmissible in evidence against the accused. The use of confessions obtained from the accused by fraud or trickery as evidence lack the fairness and equity in legal process which are commonly associated with and believed necessary to the due process of law guaranteed by the fourteenth amendment.

THE SUBJECTIVE TEST OF VOLUNTARINESS AND ILLEGAL DETENTION

Under the Indiana statute on illegal detention an officer can not legally hold an arrested person in custody for a longer period of time than is reasonably necessary to obtain a proper order for his further detention.[63] Nevertheless, the Indiana courts have consistently held that a confession is not rendered inadmissible because the accused has been illegally detained in violation of this statute and has given the confession during the period of illegal detention.[64]

There are federal statutes which require federal peace officers to bring an arrested person promptly before a magistrate.[65] The McNabb-Mallory[66] rule provides that a confession will be inadmissible in the

62. 314 U.S. 219 at 237 (1941). (Emphasis added.)

63. IND. ANN. STAT. § 9-704(A) (Burns 1956): "When an officer arrests an accused, either upon a warrant or for a misdemeanor committed within the view of the officer or for a felony when the officer has cause to believe that such a crime has been committed, he shall take the accused before the magistrate issuing the warrant, if a warrant has been issued, or before the nearest magistrate if no warrant has been issued." Sutter v. State, 227 Ind. 648, 88 N.E.2d 386 (1941). This case stated that a police officer is liable for false imprisonment if he detains a person in violation of the statute.

64. Watts v. State, 226 Ind. 655 (1949); Kraus v. State, 229 Ind. 625, 100 N.E.2d 824 (1951).

65. 18 U.S.C. § 3001 (1958) 62 Stat. 638, ch. 645 (1948), FED. R. CRIM. P. 5(a).

66. McNabb v. United States, 318 U.S. 332 (1943) held that if federal officers unnecessarily delay in bringing a defendant before a magistrate as required by federal statute, any confession obtained from the defendant prior to his appearance before the magistrate is inadmissible. In referring to the statute requiring federal officers to promptly bring persons in their custody before a magistrate, the Supreme Court said in 318 U.S. at 346 "Congress has not expressly forbidden the use of evidence so procured.

federal courts if it is obtained by federal officers who have failed to bring the accused promptly before a magistrate. Indiana decisions have held that the rule does not apply to the states because it is based on a statute limiting the acts of federal officers and not on constitutional doctrines applicable to the states.[67] Although some Supreme Court Justices have expressed the opinion that illegal detention of an accused should render a confession inadmissible,[68] the United States Supreme Court has held that the McNabb-Mallory rule has no application to the states and that a confession obtained by state law enforcement officials during a period of illegal detention of the accused is not inadmissible because of such detention.[69]

This position of Indiana Courts and the United States Supreme Court is not inconsistent with the subjective test of voluntariness. Illegal detention is merely one of the factors to be considered in determining whether the cumulative effect of all factors brought to bear upon the accused was sufficient to impair his self-determination and overcome his freedom of choice.

What effect will *Escobedo v. Illinois*[70] have upon the above rule that a confession is not inadmissible *per se* because given during a period of illegal detention? This rule obviously is based upon the standard of voluntariness as a test of admissibility of a confession; a confession is

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But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law." Mallory v. United States, 354 U.S. 449 (1957) reaffirmed the holding of the McNabb case.

67. Pearman v. State, 233 Ind. 111, 117, 117 N.E.2d 362, 365 (1954): "But these statutes are only a limitation on the acts of federal officers, and have no application to state rules of evidence. We have never held that the Indiana statutes requiring that an arrested accused be brought promptly into open court require a confession to be excluded, if it is not obtained in the violation of constitutional rights." *Accord*: Dowlut v. State 5 Ind. Dec. 171 (Lagrange Cir. Ct. 1964); Stevens v. State, 240 Ind. 19, 158 N.E.2d 784 (1959); Davis v. State, 235 Ind. 620, 137 N.E.2d 30 (1956); McClanhan v. State, 232 Ind. 567, 112 N.E.2d 575 (1953); Hicks v. State, 213 Ind. 227, 11 N.E.2d 171, *cert. denied*, 304 U.S. 564 (1937).

68. The concurring opinion of Chief Justice Douglas in Watts v. Indiana, 338 U.S. 49, 57 (1949) stated "The court should outlaw any confession obtained during a period of unlawful detention of the accused. The procedure of unlawful detention breeds coerced confessions. It is the procedure without which the inquisition would not flourish."

69. For example, in Fikes v. Alabama, 352 U.S. 191 (1957) a young Negro charged with rape was intermittently questioned for ten days until he confessed. He was not taken before the magistrate for a preliminary hearing until after his confession—ten days after his arrest. Alabama law required an accused to be brought promptly before a magistrate. While holding the confession to be involuntary, the Supreme Court stated that while violation of a state statutory requirement that one accused of a crime be taken before a magistrate without delay does not, as a matter of due process, compel rejection of the confession obtained during the period of illegal detention; it is, nevertheless, relevant circumstantial evidence in the inquiry as to physical or psychological coercion. To the same effect is Stein v. New York, 346, 156 (1953). See, Annot., 19 A.L.R.2d 1331 (1951).

70. 378 U.S. 478 (1964).

not necessarily involuntary merely because it was given by the accused while being illegally detained. It could be argued that *Escobedo* undermined the whole basis, the standard of voluntariness, since it departed entirely from the standard of voluntariness and held the accused's confession to be inadmissible even though concededly voluntary. However, the argument is not persuasive. In stressing the right to counsel in *Escobedo* the Court decided only that where an accused has been deprived of his right to counsel the confession will be inadmissible even though it is voluntary. It did not say that voluntariness is no longer a legitimate test of the admissibility of a confession under any circumstances, that is, where there is no deprivation of the right to counsel. If police officials illegally hold an accused incommunicado refusing his request to consult with counsel, his confession would be inadmissible. The confession would not be inadmissible because of the fact that it was given during the period of illegal detention, but because of the denial of the accused's right to counsel. However, if the accused waived his right to counsel, during the period of illegal detention, the confession would be admissible, absent circumstances demonstrating the confession to be involuntary. Thus, it would appear that the *Escobedo* decision does not preclude the use of the test of voluntariness in all circumstances nor require any change in the traditional rule regarding the admissibility of confessions made by an accused during a period of illegal detention. Few cases have considered that question.[71]

There is, however, a likelihood that the United States Supreme Court will apply the McNabb-Mallory rule to the states in the future. An indication of this may be found in *Mapp v. Ohio*[72] and *Wong Sun v. United States*.[73] *Mapp* declared that evidence obtained by illegal search or seizure is not admissible in evidence. It held that the use of such evidence—fruit of illegal conduct—is violative of due process guaranteed to persons in the state courts by the fourteenth amendment. The Court thus extended to the states a doctrine which had previously only been applied in federal prosecutions.

Using this doctrine as its premise, the United States Supreme Court

71. The Supreme Court of Hawaii in the recent case of State v. Kitashiro, 397 P.2d 558 (Hawaii 1964) stated: "While Escobedo marks a shift in course, upon comparison with Crooker v. California, 357 U.S. 433, Cicenia v. La Gay, 357 U.S. 504, Culombe v. Connecticut, 367 U.S. 568, and Haynes v. Washington, 373 U.S. 568, the point pertinent here is that emphasis was put upon the right to counsel. The McNabb-Mallory rule was not extended to state cases. It remains the rule in this jurisdiction that a confession obtained during unlawful delay between the arrest and the production of the accused before a magistrate is not *ipso facto* inadmissible." *Accord,* Dowlut v. State, 5 Ind. Dec. 171 (Lagrange Cir. Ct. 1964).

72. 367 U.S. 643 (1961).

73. 371 U.S. 471 (1963).

in *Wong Sun* held a confession given by the accused while under illegal arrest to be inadmissible even though there was no evidence that it was involuntary. Federal narcotics agents had entered the home of the accused without a search warrant, handcuffed him, and declared him under arrest. The agents questioned him about the sale of heroin and told him that he had been identified as a user of heroin. The accused thereupon confessed to the use and possession of the narcotic. In holding the confession inadmissible because it was obtained during an illegal seizure of the accused, the Court reasoned that since physical evidence obtained by unlawful search or seizure is inadmissible as fruits of unlawful conduct, so should verbal evidence (a confession) be inadmissible when derived from illegal seizure.

Since the United States Supreme Court in federal prosecution has interpreted the rule excluding evidence obtained by way of illegal seizure or search as embracing confessions as well as physical evidence, such as stolen goods, it would not be surprising to find the Supreme Court, in applying *Mapp. v. Ohio* to the states, holding that confessions obtained during illegal arrest are inadmissible. Such an application of the McNabb-Mallory rule to the states would be a logical extension of the Supreme Court's position as evidenced by *Mapp v. Ohio* and particularly *Escobedo v. Illinois.*[74]

THE RIGHT TO COUNSEL

The Indiana constitutional right of the accused to counsel contemplates his right to consult with counsel at every stage of the proceedings.[75] In referring to the right to counsel, the court in *Batchelor v. State*[76] said: "Where a right is conferred by law, everything necessary for its protection is also conferred, although not directly provided for. . . . To give life and effect to the provision of the Constitution under consideration, it must be held to confer upon the relator every privilege which will make the presence of counsel upon the trial a valuable right."[77] Despite the sweeping language of *Batchelor,* it is the established rule in Indiana that a confession is not excluded from evidence solely

74. Under facts similar to those in Wong Sun the Indiana Supreme Court has found the confession admissible. Rohlfing v. State, 230 Ind. 236, 102 N.E.2d 199 (1952).

But the Supreme Court in Wong Sun v. United States, 371 U.S. 471 (1963) appears to have departed from the voluntary test; in that case there was no evidence of coercion exercised upon the accused. In addition, the fact that the guarantee against self-incrimination and the guarantee against illegal search and seizure are separate and distinct constitutional provisions did not appear to concern the United States Supreme Court in Wong Sun.

75. IND. CONST. art. 1 § 13; Sutter v. State, 227 Ind. 648, 38 N.E.2d 386 (1949).

76. 189 Ind. 69, 125 N.E. 773 (1920).

77. *Id.* at 77, 125 N.E. at 776.

because the accused was without counsel at the time of making the confession.[78] It is significant that in no case where the Indiana Supreme Court held the lack of counsel not to invalidate the confession did the accused *request* the assistance of counsel. A few cases have suggested that the Indiana courts might hold a confession inadmissible where the accused had requestd and been denied counsel.[79]

However, it would appear that under the subjective test Indiana would not exclude a confession solely because the accused's request for counsel has been denied. The fact that the accused has been denied his constitutional right to consult with counsel does not by itself demonstrate that the confession was not freely given by the accused. There is no necessary relation between consultation with an attorney and the voluntary nature of the confession. If the voluntariness of a confession is the test of its admissibility, then there is no reason for excluding it from evidence solely because the accused has been denied his right to consult with counsel. Such a denial should be merely one factor to be considered in conjunction with other circumstances in determining whether a confession was a product of a free and unconstrained mind.

Indiana's application of voluntariness as the sole standard for the admissibility of confessions has resulted in few restraints on police. It is clear that a confession is admissible even though the accused does not understand that he is entitled to the advice of a lawyer before making it.[80] The accused's interrogators are not under any duty to advise him of his right to counsel, or of his right to remain silent, or that anything he may say may be used against him.[81] Nor do the police have an obligation to provide the accused with an attorney.[82]

Until recently it was recognized that a confession was not inadmissible in evidence solely because the accused had been denied the right

78. See, *e.g.*, Britt v. State, 242 Ind. 556, 180 N.E.2d 235 (1962); Flowers v. State, 236 Ind. 158, 139 N.E.2d 185 (1956); Kelley v. State, 231 Ind. 671, 110 N.E.2d 860 (1953); May v. State, 232 Ind. 523, 112 N.E.2d 439 (1953); Hawkins v. State, 219 Ind. 116, 37 N.E.2d 79 (1941).

79. Dearing v. State, 229 Ind. 131, 95 N.E.2d 832 (1951); Sutter v. State, 227 Ind. 648, 88 N.E.2d 386 (1949); Eiffee v. State, 226 Ind. 57, 77 N.E.2d 750 (1948); After citing the Sutter and Dearing cases, the Lagrange Circuit Court in State v. Dowlut, 5 Ind. Dec. 171, 173 (1964) stated: "Neither of these cases assert unequivocally that a failure to provide counsel upon demand will render the confession inadmissible *per se*. However, it would be a most unusual case that would justify holding a confession admissible if taken after counsel had been demanded and refused."

80. Britt v. State, 342 Ind. 556, 180 N.E.2d 235 (1962); Kelley v. State, 231 Ind. 671, 110 N.E.2d 860 (1953).

81. Flowers v. State, 236 Ind. 158, 139 N.E.2d 185 (1956); Marshall v. State, 227 Ind. 1, 83 N.E.2d 763 (1949); Eiffee v. State, 226 Ind. 57, 77 N.E.2d 750 (1948); Hawkins v. State, 219 Ind. 116, 37 N.E.2d 79 (1941).

82. Marshall v. State, 227 Ind. 1, 83 N.E.2d 763 (1949); Hawkins v. State, 219 Ind. 116, 37 N.E.2d 79 (1941).

to counsel. The United States Supreme Court had stated that a refusal to permit the accused to communicate with legal counsel does not by itself render the confession inadmissible, but is merely one factor to be considered in the total situation in determining whether the confession was voluntarily given.[83] In *Escobedo*[84] the United States Supreme Court ruled that the defendant's confession of murder was inadmissible as evidence against him, *even though voluntarily given,* because he had been denied his right to consult with counsel. The Supreme Court now maintains, that the voluntary nature of the confession is completely irrelevant where the interrogators of the accused have denied him his constitutional right to counsel.[85]

The as yet unresolved question is, under what circumstances a confession will be found inadmissible solely upon the basis of the accused's lack of counsel at the time of his confession. This is a particularly difficult question because of the special facts in the *Escobedo* case. Escobedo was arrested by the police for the murder of his brother-in-law. A suspect whom the police had previously arrested admitted involvement in the murder and named Escobedo as the killer. The police interrogated Escobedo urging him to confess because he had been named by his alleged accomplice. Escobedo's mother had employed an attorney, who was at the police station in an adjoining room while Escobedo was being interrogated. His requests to see Escobedo were denied. Escobedo's requests to see his attorney were also denied. When the police confronted Escobedo with his accomplice who pointed to Escobedo and said he had fired the fatal shot Escobedo replied that he had not fired the shot, but that the accomplice had. He thereby admitted participation in the crime. This confession was later reduced to writing.

The Court held that: "Where the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, *the suspect has requested and been denied an opportunity to consult with his counsel, and the police have not effectively warned him of his absolute constitutional right to remain silent,* the accused has been denied 'the assistance of counsel' in violation of the Sixth Amend-

83. Culombe v. Connecticut, 367 U.S. 568 (1961).
84. 378 U.S. 478 (1964) (5-4 Decision).
85. *Id.* at 495; This has been the dissenting position of the Court for sometime: Dissenting opinion in Crooker v. California, 357 U.S. 433, 441 (1958) by Justices Douglas, Black, and Brennan. Dissenting opinion in Cicenia v. Lagay, 357 U.S. 504, 511 (1958) by Justices Douglas and Black. Dissenting opinion in In Re Groban, 352 U.S. 330, 337 (1957) by Justices Black, Douglas, and Brennan.

ment which is obligatory upon the states by the Fourteenth Amendment and no statement elicited by the police may be used against him at the criminal trial."[86]

The Supreme Court in *Escobedo* did not rule that a confession would be inadmissible if the accused does not have counsel at the time of making it even though he has not specifically requested such assistance. Its holding was limited to the situation before it where the accused had requested and been denied the assistance of counsel already retained on his behalf. However, it appears that the import of this decision is that a confession given by an acused while without the aid of counsel will be inadmissible regardless of whether the accused has requested counsel, unless the accused has waived his right to counsel.[87]

Prior to *Escobedo* it was clear that an accused had a right to counsel when judicial proceedings, such as arraignment, were taken against him, but it was not settled whether he had a right to counsel prior to arraignment. *Escobedo* resolved this question. It is now clear that the defendant's right to counsel accrues at the time he is taken into custody and the focus of inquiry centers upon him.[88] This ruling of *Escobedo* viewed in the light of *Carnley v. Cochran*[89] leads to the conclusion that the accused need not request counsel. In *Carnley* the United States Supreme Court stated: "[I]t is settled that where the assistance of counsel is a constitutional requisite the right to be furnished counsel does not depend on request."[90] In stressing the defendant's request for the aid of counsel the Court in *Escobedo* did not say that such a request was necessary to give rise to his right to counsel. Rather it treated his request for counsel and denial of that request as *evidence* that the investigation had reached the accusatory stage at which the right to counsel accrued.[91]

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86. Escobedo v. Illinois, 378 U.S. 478, 491. (Emphasis added.)

87. The dissenting opinion of Justice White concurred in by Justices Clark and Stewart in stating this view said in *Id.* at 495: "Although the opinion purports to be limited to the facts of this case, it would be naive to think that the new constitutional right announced will depend upon whether the accused has retained his own counsel or has asked to consult with counsel in the course of interrogation. At the very least the court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to police thereafter is inadmissible in evidence unless the accused has waived his right to counsel."

88. Thus, where one freely walks into a police station and voluntarily admits his guilt, his confession is not inadmissible because of the absence of counsel. Likewise, where a defendant is one of several persons, such as the acquaintances of the victim, questioned in a *general* investigation of a crime with no intent of eliciting a confession from him, and he voluntarily confesses to the crime, his confession will be admissible.

89. 369 U.S. 506 (1962).

90. *Id.* at 510.

91. The Court stated in 378 U.S. at 485: "The interrogation here was conducted before the petitioner was formally indicted. But that should make no difference. When the petitioner requested and was denied an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of 'an unsolved crime.' The peti-

The defendant's right to counsel should not depend upon a request for legal assistance. A distinction based on whether or not the accused requested counsel would treat the uninformed person as if he had no right to counsel. An accused's right to the assistance of counsel should not depend on his knowledge of that right. In addition, *Escobedo* refused to recognize any artificial distinction between post and pre-arraignment periods as affecting the time when the defendant's right to counsel accrues; yet the distinction between the confession of the defendant who specifically requests counsel and an uninformed one who submits no such request would be an equally untenable artificiality. Thus, a confession obtained from the accused when he is without the assistance of counsel will probably be inadmissible regardless of whether he has specifically requested counsel.[92]

A confession will not be excluded because of the absence of counsel if the accused has waived his right to counsel. *Escobedo* made this clear.[93] However, the right to counsel is not waived unless it is intelligently and understandingly waived.[94] An accused cannot realistically waive his right to counsel if he is unaware that he is entitled to legal assistance. It follows that the mere failure of the accused to request counsel cannot be construed as a waiver of the right to counsel unless it is shown that he was aware of that right. In *Carnley* the United States Supreme Court said: "Presuming waiver from a silent record is impermissible. The record must show that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver."[95]

The next question that arises from the ruling in *Escobedo* is whether the accused must be warned of his right to remain silent which is based upon the fifth amendment guarantee against self-incrimination. This problem will not arise where the defendant has the aid of counsel since his attorney will advise him of his right to remain silent and caution him not to make any admissions. Is a confession inadmissible where the accused has been advised of his right to counsel and waived that right,

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tioner had become the accused and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so."

92. Although there are as yet relatively few decisions interpreting Escobedo, there are several authorities which hold that an accused need not request counsel: Cruz v. Delgado, 233 F. Supp. 944 (D.C. Puerto Rico, 1964); Wright v. Dickerson, 336 F.2d 878 (9th Cir. 1964); People v. Dorado, 40 Cal. Rptr. 264, 394 P.2d 952 (1964); State v. Hall, 397 P.2d 261 (Idaho 1964) (concurring opinion); Russo v. New Jersey, 33 U.S.L. Week June 1, 1965 2621 (3d Cir. 1965); State of Oregon v. Neely, 395 P.2d 557 (Ore. 1964); State v. Dufour, 206 A.2d 82 (R.I. 1965).

93. "The accused may, of course, intelligently waive his right to counsel." 378 U.S. 478, 492 (1964).

94. Carnley v. Cochran, 369 U.S. 506 (1962).

95. *Id.* at 514.

but has not been advised of his constitutional right not to answer incriminating questions? There is authority to support the view that the defendant must be advised of both his right to counsel and his right to remain silent.[96] If the purpose of guaranteeing to a defendant the right to counsel was merely to insure him of his right to silence, then it would be plausible to argue that if the accused is advised of his right to counsel he need not be advised of his right to remain silent and vice versa. Then if he exercises his right to counsel, his attorney will advise him of his right to silence and if he does not request counsel after being informed of that right he will have waived both of these rights. However, this view is not tenable. The right to silence is not merely an adjunct of the right to counsel; the two rights are separable and distinct. The former is based on the fifth amendment right against self-incrimination and the latter upon the sixth amendment. *Escobedo* stressed both the denial of counsel and the failure to advise the defendant of his absolute right to remain silent. The harm caused by the denial of counsel is depriving the defendant of an attorney's advice as to what statements it is safe for him to make and what would be the legal effect of particular admissions he may make; it is not the lack of a warning to the accused to say nothing. This was stressed by the court in *Escobedo* as the core of the right to counsel. The defendant stated that he had not fired the fatal shot but his accomplice had. The court stated that the defendant was undoubtedly unaware that an admission of complicity in a murder plot is as damaging as an admission of firing the fatal shot. "The 'guiding hand of counsel' was essential to advise the petitioner of his rights in this delicate situaiton."[97]

The dissenting opinion in *Escobedo* supports the view that a confession is inadmissible if the defendant did not know of or was not informed of his right to remain silent. It intimated that it would have supported the majority decision if it were based upon such a rule. Justice White, joined by two other Justices, stated: "The failure to inform an accused that he need not answer and that his answers may be used against him is very relevant indeed to whether the disclosures are compelled. Cases in this court, to say the least, have never placed a premium on ignorance of constitutional rights. *If an accused is told he must answer and did not know better, it would be very doubtful that the resulting admissions could be used against him.*"[98] The constitutional right to

96. See cases cited in note 92 *supra*. See also, FEDERAL BUREAU OF INVESTIGATION, TRAINING BULLETIN (No. 69, 1965).

97. Escobedo v. Illinois, 378 U.S. 478, 486 (1964).

98. *Id.* at 499. (Emphasis added.)

remain silent should not depend upon knowledge of it any more than the constitutional right to counsel. To hold that one not knowledgable of his right to silence need not be informed of it is to treat him as if he had no such right.

Must the police furnish the defendant with counsel during interrogation at the expense of the state? It would be invidious discrimination to limit the right to counsel to defendants who are financially able to employ their own counsel. Constitutional rights should not depend upon the affluence of the defendant. This would be the effect if the *Escobedo* decision were interpreted so that a defendant's right to counsel is not violated when his request for counsel during interrogation is refused because of his inability to pay or when, after being informed of his right to counsel, he fails to request counsel because of his inability to pay.

The United States Supreme Court has said that in criminal trials a state can no more discriminate on account of poverty than on account of religion or race.[99] It also held that such discrimination violates the equal protection clause of the fourteenth amendment.[100] These cases referred to the denial of counsel to an indigent at the trial stage, but there is no reason to believe that the accused's right to counsel during interrogation will be any more dependent upon his ability to pay than is his right to counsel at the trial. It is reasonably clear that *Escobedo* in the light of *Powell v. Alabama*[101] and *Gideon v. Wainwright*[102] will render the confession of an indigent defendant inadmissible if the state has not furnished him legal counsel unless he has understandingly waived his right to counsel. *Gideon v. Wainwright,* in referring to the right to counsel at the trial, held that the accused has the absolute right in *all* criminal prosecutions to be represented by counsel and the right to have counsel appointed for him if he is an indigent unless he completely waives the right to counsel. As stated in *Pewell v. Alabama* the indigent defendant's right to have counsel appointed does not depend on a request by him. The court also made clear that an indigent defendant's right to the appointment of counsel would apply to any period during which the presence of counsel is necessary to give effective aid in the preparation and trial of the case. This period must surely embrace the interrogatory stage during which a confession is elicited from the accused. The Supreme Court in *Escobedo* characterized the interrogatory stage as the critical period during which the accused is most in need of counsel. It

99. Griffin v. Illinois, 351 U.S. 112 (1956).
100. Douglas v. California, 372 U.S. 353 (1963).
101. 287 U.S. 45 (1937).
102. 372 U.S. 335 (1963).

would be an irreconcilable departure from its rationale in *Powell v. Alabama* and in *Gideon v. Wainwright* if the Supreme Court did not hold it necessary that the indigent defendant have the right to the appointment of counsel for him during interrogation in order to give effect to his right to counsel after interrogation.[103]

Likewise, it appears that *Escobedo* does not require the accused to have counsel already retained. Such a requirement would again cause his right to counsel to depend on his financial ability to employ counsel. As previously noted the Supreme Court rejects any such preconditions as discrimination in violation of the equal protection clause. In addition, the right would be limited to those few who have employed counsel in anticipation of arrest, or who have had counsel employed by relatives upon news of the arrest.

There have been several decisions in state courts upon *Escobedo* disagreeing with all of the above conclusions. They all appear to rest upon a strict and literal construction which limits the rule of *Escobedo* to the facts in that case. They have ruled that the accused must specifically request the assistance of counsel and that he need not be advised of either his right to counsel or of his right to remain silent.[104] The Supreme Court of New Mexico has held that not only must the accused have requested counsel, but he must have already retained an attorney.[105]

It is clear that the *Escobedo* decision will produce changes in Indiana's rules regarding the right to counsel. There has been only one major Indiana case since *Escobedo* involving the right to counsel as affecting the admissibility of confessions. In *Hayden v. State*[106] the Supreme Court of Indiana upheld a confession given by a fifteen-year-old boy charged with purse-snatching and murder. The police twice advised the accused of his right to counsel, but he failed to request legal assistance.

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103. The Supreme Court stated in Escobedo v. Illinois 378 U.S. 478, 488 (1964) after referring to Gideon v. Wainwright: "The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the right to use counsel at the formal trial would be a very hollow thing if, for all practical purposes, the conviction is already assured by pre-trial examination. One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel now. They can't escape the noose. There is nothing that counsel can do for them at the trial.'"

104. See, *e.g.*, United States v. Ogilvie, 334 F.2d 837 (7th Cir. 1964); Scamahorne v. Commonwealth, 33 L.W. 2632 (Ky. Ct. App. 1965); Commonwealth v. Tracy, 33 U.S.L. Week, June 1, 1965 2620 (Sup. Jud. Ct. Mass. 1965); Bean v. State, 33 U.S.L. Week 2390 (Sup. Ct. Nev. 1965); People v. Hartgraves, 202 N.E.2d 33 (Sup. Ct. Ill. 1964); State v. Fox, 131 N.W.2d 684 (Sup. Ct. Iowa 1964); Anderson v. State, 205 A.2d 281 (Sup. Ct. Maryland 1964); Commonwealth v. Patrick, 206 A.2d 295 (Sup. Ct. Penn. 1964); Browne v. State, 131 N.W.2d 169 (Sup. Ct. Wisc. 1964); Turner v. State, 384 S.W.2d 879 (Sup. Ct. Texas 1964); State v. Vigliano, 43 N.J. 44, 202 A.2d 657 (1964); *Contra,* see cases in note 92 *supra.*

105. Pece v. Cox, 396 P.2d 422 (S. Ct. of New Mex. 1964).

106. 201 N.E.2d 329 (Ind. 1964).

The accused apparently was not warned of his right to remain silent. The court concluded that the accused had waived his right to counsel by failing to request legal assistance after having been informed of his right to counsel, and thus, the confession was admissible because there was no evidence that it was not voluntary. Since the court expressed no opinion as to whether the defendant must specifically request counsel under *Escobedo* or as to whether he must be advised of his right to counsel or of his right to silence, this case provides little insight as to how Indiana will interpret *Escobedo*.[107]

It does not appear that the *Escobedo* decision completely precludes all confessions nor vitiates the voluntary test as a standard for the admissibility of confessions obtained in the absence of counsel under all circumstances. A confession is not rendered inadmissible because the accused was without legal counsel at the time of making the confession where he has intelligently waived his right to counsel. Where there has been such a waiver, the admissibility of the confession is governed by the subjective test of voluntariness. This is exemplified in *Hayden* where the Indiana Supreme Court, after citing *Escobedo,* held the confession admissible in the absence of any evidence indicating that it was not voluntarily given since the accused had waived his right to counsel. Also, it should be noted that under *Escobedo* the defendant's right to counsel does not accrue until the investigation centers upon him as the accused and he is questioned for the purpose of eliciting a confession.[108]

The *Escobedo* decision has been met with criticism, both within and without the legal profession, and especially from law enforcement officials. This is understandable since it makes a complete departure from the rule universally honored by the courts for over a hundred years that a confession is admissible if voluntary, despite the deprivation of the accused's right to counsel. The rule announced in *Escobedo* certainly makes the law enforcement officer's task more difficult. It has been argued that the effect of giving the accused the right to consult with legal counsel during interrogation will greatly reduce the number of confessions obtained by the police and thus undermine effective law enforcement, since any lawyer will advise his client to make no statement to the

107. But see, State v. Dowlut, 5 Ind. Dec. 171 (Lagrange Cir. Ct. 1964) where the circuit court held that the waiver of the right to counsel by a seventeen-year-old defendant of above average intelligence was a nullity, since he was not taken before a magistrate where a person trained in the law could explain in detail his right to counsel and since his waiver was made in the absence of consultation with any attorney or other friendly person of mature judgment. The accused had been advised of both his right to counsel and his right to remain silent, but he had stated that he did not desire legal assistance.

108. See note 88 *supra.*

police.[109] On the other hand it is said that the evidence for the state would be more reliable and acceptable to jurors, thus providing a stronger case, if it were independently secured by skillful investigation. If the defendant is permitted to consult with a lawyer, he will become aware of and exercise his constitutional right not to answer questions. But ". . . if the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."[110] A system of law enforcement certainly is not desirable when its continued effectiveness depends upon the defendant's ignorance of his constitutional rights.

PROCEDURAL RULES IN THE TRIAL COURT AND ON APPEAL

In a pre-trial hearing in the absence of a jury, the judge determines whether the confession was voluntarily given by the accused. The judge, not the jury, determines the admissibility (voluntariness) of the confession.[111] This rule is in accord with that of the United States Supreme Court. In *Jackson v. Denno*[112] the United States Supreme Court ruled that leaving the question of voluntariness to a jury violates the due process clause of the fourteenth amendment since, if the confession is found to be involuntary but true, there will be no way of knowing whether the jury has relied on the confession for its verdict. Where the accused fails to object to the failure of the court to have a preliminary hearing on the admissibility of the confession and fails to offer proof of the incompetency of the confession, the accused waives any question as to its admissibility.[113] A condition precedent to the admissibility of a confession is that the state establish the *corpus delicti* by clear proof independent of the confession. Proof of the *corpus delicti* means proof that the specific crime charged has been committed by someone.[114] The

109. The decrease in the number of confessions obtained is asserted to be undesirable because: (1) the pre-Escobedo rules of exclusion adequately eliminate the dangers of coercion so that admissible confessions are trustworthy; (2) confessions coming from the accused are an invaluable source of information for the jury; (3) in many cases the accused is the only witness to the crime and his testimony is the only source of first hand information; (4) in combatting organized crime the confession of one member may provide invaluable identification of other members; and (5) confessions are often freely given out of a sense of guilt immediately following the commission of a crime, and such completely voluntary confessions should not be excluded. 38 So. CAL. L. REV. 156 (1965) Note: "Right to Counsel During Police Interrogation," Larry Thrall.

110. Escobedo v. Illinois, 378 U.S. 478, 492 (1964).

111. Sturgeon v. State, 237 Ind. 29, 143 N.E.2d 411 (1957); McGee v. State, 230 Ind. 429, 104 N.E.2d 726 (1952); Mack v. State, 203 Ind. 355, 180 N.E. 279 (1932); Ogle v. State, 193 Ind. 187, 127 N.E. 547 (1920); Brown v. State, 71 Ind. 470 (1880).

112. 378 U.S. 368 (1964).

113. Sturgeon v. State, 237 Ind. 25, 143 N.E.2d 411 (1957).

114. Brown v. State, 239 Ind. 206, 154 N.E.2d 720 (1959); Schlegel v. State, 238 Ind. 376, 150 N.E.2d 563 (1958); Hunt v. State, 235 Ind. 280, 133 N.E.2d 48 (1956);

state need not prove all the facts stated in the confession but only the *corpus delicti,* and it is not necessary to establish the *corpus delicti* beyond a reasonable doubt.[115]

The defendant has no right to the pre-trial inspection of an extrajudicial confession made by him. It is provided by statute in Indiana that in all cases where no special provision is made in the criminal code, the rules of pleading and practice in civil actions shall govern.[116] The Indiana civil code[117] provides that the court may, under proper restrictions, order either party to give the other an inspection and copy of any book or part thereof, paper or document in his possession, or under his control, containing evidence relating to the merits of the action or the defense therein. There is no special provision in the criminal code governing the defendant's right to pre-trial inspection of his confession. Therefore, as can be seen from the civil code the defendant has no absolute right to pre-trial discovery of his confession but the granting of this privilege is left to the court's discretion.[118] This rule has been held consistent with the defendant's rights to due process of law under the fourteenth amendment. The United States Supreme Court held in *Cicenia v. Lagay*[119] that although it is the better practice for the prosecution to grant the accused's attorney pre-trial inspection of the confession, the due process clause of the fourteenth amendment is not violated when the accused in a state court is denied permission to inspect his confession prior to the trial. Also, under the Federal Rules of Criminal Procedure the accused in a federal court has no right to inspect his confession prior to trial.[120]

It appears that the accused should have the right under the fourteenth amendment to inspect his confession prior to trial. Such a right is necessary to the effectiveness of the accused's right to counsel. It is important that the accused's attorney have an accurate knowledge of the contents of the confession so that he can properly prepare his defense.[121] Mr. Justice Brennan has said, "To deny pre-trial disclosure of the defendant's statements is to shackle counsel so that he can not effectively

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Simmons v. State, 234 Ind. 489, 129 N.E.2d 121 (1955); Dennis v. State, 230 Ind. 210, 102 N.E.2d 650 (1952).

115. Holding v. State, 1 Ind. Dec. 347, 190 N.E.2d 660 (1963).

116. IND. ANN. STAT. § 9-2407 (Burns 1956).

117. IND. ANN. STAT. § 2-1645 (Burns 1956).

118. The Supreme Court in Weer v. State, 219 Ind. 217, 36 N.E.2d 787 (1941) held that there is no absolute right to the production or extraction of papers held by the prosecution but rests in the discretion of the court. Accord, Anderson v. State, 239 Ind. 272, 156 N.E.2d 384 (1959).

119. 357 U.S. 503 (1957).

120. United States v. Murray, 297 F.2d 812 (1962).

121. In Illinois the accused has a statutory right to pre-trial inspection of his confession. ILL. REV. STAT., ch. 38, § 114-10(a) (Smith-Hurd) (1963).

seek out the truth and afford the accused the representation which is not his privilege but his absolute right."[122] Reasoning that the defendant's right to counsel at trial would be of small utility if he did not possess that right during interrogation, the Court in *Escobedo* held that a confession made without benefit of council is inadmissible under the fourteenth amendment. Likewise, the effectiveness of the defendant's right to counsel at trial can be seriously impeded if his attorney does not have access to his confession prior to trial. It thus appears that the defendant should have the right to pre-trial discovery of his confession in order fully to effectuate his right to counsel at trial.

Confessions are *prima facie* admissible, and the accused has the burden of proving them inadmissible, that is, involuntary.[123] "A confession by a person accused of crime is presumed to be voluntarily made until the contrary is shown."[124] This is a tremendous burden upon an accused since ordinarily it will merely be his word against that of the police officials. Usually an accused can not prove the involuntary nature of a confession unless he can show physical signs of mistreatment such as bruises, cuts, fractured bones, *etc.* Even then he has the difficult task of showing that these were inflicted by the police. It is seldom that an accused can offer proof sufficient to rebut the presumption that the confession was voluntarily given. Under *Escobedo* there will be no problem of proof since the accused's attorney will be available to testify as to any coercion that may be applied to obtain a confession. In fact, coercion and most likely the confession itself will be eliminated by the presence of counsel since the police will not engage in questionable practices in the presence of counsel. But even if the accused is denied counsel, he is still in a much better position since *Escobedo* seems to have shifted the burden of proof onto the state. It requires the exclusion of the confession where the accused was not represented by counsel during the interrogation unless he waived his right to counsel. The burden of proof is upon the state to show that the accused waived his right to

122. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth,* 1963 WASH. U.L.Q. 279, 287. The Supreme Court of Bronx County, New York in People v. Quarles, 255 N.Y.S.2d 599 (1965), after reviewing Gideon v. Wainwright, 372 U.S. 335 (1963), Messiah v. United States, 377 U.S. 201 (1964), and Escobedo v. Illinois, 378 U.S. 478 (1964) held that the defendant is entitled *as a matter of right* to pre-trial inspection of his confession.

123. Matthews v. State, 239 Ind. 254, 156 N.E.2d 387 (1959); Pierce v. State, 236 Ind. 545, 141 N.E.2d 109 (1957); Pearman v. State, 233 Ind. 111, 117 N.E.2d 362 (1954); Schuble v. State, 226 Ind. 299, 79 N.E.2d 647 (1948); Caudill v. State, 224 Ind. 531, 69 N.E.2d 549 (1946).

124. *Thurman v. State,* 169 Ind. 240, 82 N.E. 64 (1907).

counsel; it is not upon the accused to disprove a waiver.[125] Once it proves the defendant was informed of his right to counsel and declined that right, then the defendant has the burden of proving that he knowingly waives that right.

As a necessary and obvious corollary to the presumption of voluntariness of confessions, the accused has the right to show under what circumstances the confession was made before it is admitted as evidence.[126] However, if he does not make a reasonable objection to the admission of the confession, the accused will be considered to have waived his right to challenge the voluntariness of the confession.[127]

If the judge determines that the confession was voluntarily given by the accused and admits it as evidence, the accused has the right to present evidence to the jury to contradict or discredit the confession.[128] The judge may admit the confession as evidence in whole or in part, but where only a part of the confession is admitted the accused has the right to introduce the whole statement made by him.[129]

Neither Indiana nor the United States Supreme Court will review a trial court's determination of issues of fact. If the accused was given an opportunity to prove the inadmissibility of his confession, an appellate court will not disturb the trial court's determination of the admissibility of the confession where there is conflicting evidence as to the voluntariness of confession. It will overrule a lower court's determination only if it is *clearly* erroneous.[130] Obviously, the trial court is in the best position to evaluate all of the conflicting evidence and to decide whether the confession was voluntary.[131] As was made clear in *Watts v. Indiana,*[132] all matters which are issues of fact are for conclusive determination by state courts and will not be reviewed by the United States Supreme Court.

However, the United States Supreme Court will review the state court's determination as to whether a confession given under facts de-

125. The United States Supreme Court stated in Carnley v. Cochran, 369 U.S. 506 (1962) that every presumption is indulged in against the waiver of a constitutional right, such as the right to counsel, and the burden of proving a waiver of the right to counsel is upon the state.

126. McGee v. State, 230 Ind. 429, 104 N.E.2d 726 (1952); Krauss v. State, 229 Ind. 630, 100 N.E.2d 824 (1951).

127. Hansbrough v. State, 228 Ind. 688, 94 N.E.2d 534 (1950).

128. McGee v. State, 230 Ind. 429, 104 N.E.2d 726 (1952); Krauss v. State, 229 Ind. 630, 100 N.E.2d 824 (1951); Mack v. State, 203 Ind. 355, 180 N.E. 279 (1932).

129. Mack v. State, 203 Ind. 355, 374 (1932).

130. Shipman v. State, 243 Ind. 245, 183 N.E.2d 823 (1962); Britt v. State, 242 Ind. 548, 180 N.E.2d 235 (1962); Matthews v. State, 239 Ind. 252, 156 N.E.2d 387 (1958); Pearman v. State, 233 Ind. 111, 117 N.E.2d 362 (1954); Hicks v. State, 213 Ind. 277, 11 N.E.2d 171 (1937).

131. Hauk v. State, 148 Ind. 238, 47 N.E. 465 (1897).

132. 338 U.S. 49 (1949).

termined by the trial court was secured in violation of the accused's rights under the Constitution. Thus, if the accused contends that he was continuously questioned until exhausted, deprived of adequate food and sleep, *etc.*, the United States Supreme Court will accept as conclusive the state court's determination as to whether these facts were present; but it will review the state court's determination as to whether such facts rendered the confession involuntary.

Unlike the United States Supreme Court, the Indiana Supreme Court will not review the trial court's determination of the voluntariness of the confession if there are reasonable grounds for that decision. The state courts are free to promulgate any reasonable rules for review, and these rules need not coincide with those of the United States Supreme Court. The rule adopted by the Indiana Supreme Court is apparently not unreasonable. In fact the United States Supreme Court applies a similar rule in its review of the decisions of the various federal agencies. It will not review any decision of a federal agency, such as the Federal Trade Commission, unless that decision is clearly unsupported by the facts.[133]

In *Watts v. Indiana*[134] the United States Supreme Court stated that a coerced confession is inadmissible even though the statements in it may be independently established as true. This rule indicates that no portion of a confession obtained in violation of the accused's constitutional rights is admissible against him. But the practice in Indiana as well as in most states is contrary. Upon retrial of Watts after his confession had been ruled involuntary by the United States Supreme Court, the Indiana Supreme Court in *Watts v. State*[135] ruled that although the confession, as a whole, was not admissible, it was not error for the trial court to admit the accused's admission in the illegal confession divulging the hiding place of the murder weapon, nor was it error to admit the gun found by the police from information in the confession since the gun was proved to have been the lethal weapon. Although Indiana will not allow the whole of an illegal confession to be used in evidence against the accused, it has consistently admitted in evidence admissions from it if proved true independent of the confession.[136]

133. 5 U.S.C. § 1009(e)(a)(5) (1958); 60 Stat. 243, ch. 324, § 10 (1946).
134. 338 U.S. 49 (1949).
135. 229 Ind. 80, 95 N.E.2d 570 (1950).
136. In McCoy v. State, 241 Ind. 104, 170 N.E.2d 43 (1960) the accused's confession divulged the whereabouts of radios stolen by him. The Court admitted the stolen radios in evidence relying upon Watts v. State (1950). The same result was reached upon similar facts in Dunbar v. State, 177 N.E.2d 452 (1962). In Temple v. State, 195 N.E.2d 850, 2 Ind. Dec. 656 (1964) the court stated that even if the statement by the defendant as to the whereabouts of the coat worn in the robbery was made as part of an illegally obtained confession to the crime of robbery, the statement is admissible and the coat itself is admissible in evidence if it is established independent of

Wharton and Wigmore note that at common law, the exclusion of an involuntary confession was based solely on its unreliability.[137] Courts therefore adopted the rule that physical evidence discovered by coercing information from the accused is admissible since it is not subject to the objection of unreliability.[138] Permitting statements from an inadmissible confession to be used in evidence against the accused if independently proved also appears to be based upon the reliability rationale.

It is difficult to perceive why portions of a coerced confession should be admissible because independently proved to be reliable but not the whole confession if also independently proved reliable. Neither the illegal confession *in toto* nor admission from it should be allowed in evidence against the accused even if proved to be true independent of the confession. It is as much a denial of due process of law to allow admissions obtained in violation of the accused's constitutional rights to be used against him as it is to use the whole confession even though independently established as true. In both instances he is compelled to give evidence against himself in contraveniton of the guarantee of the fifth amendment against self-incrimination.

The rationale of reliability is no longer valid, for the United States Supreme Court held in *Richmond v. Rogers*[139] that the use of coercive methods, not the lack of trustworthiness, is the basis for the due process requirement that involuntary confessions be excluded from evidence. Thus, it is the manner in which evidence is obtained from the accused, not its reliability, that determines whether it may be used against the accused. Therefore, although the United States Supreme Court has not yet decided the precise question in regard to state proceedings, it appears almost certain that it would hold the accused's procedural due process rights violated if statements from an excluded confession or physical evidence secured as a direct result of information in the confession are admitted in evidence against the accused even though such evidence is proved true independent of the confession.[140]

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the confession that it was worn during the time of the robbery The robbery victim had identified the defendant's coat as that worn by the robber. In Dowlut v. State, 5 Ind. Dec. 171 (Lagrange Cir. Ct. 1964) in a confession of murder illegally obtained from the defendant, he divulged the hiding place of the gun. The court held that the gun could be admitted in evidence if the state proved by evidence independent of the confession that the gun was the lethal weapon.

137. 3 WIGMORE, EVIDENCE § 823 (3d ed. 1940); 2 WHARTON, CRIMINAL EVIDENCE § 678 (10th ed. 1955).

138. WIGMORE, *op. cit. supra* note 137 at §§ 856-858.

139. 365 U.S. 534 (1961).

140. Since physical evidence acquired as a result of an illegally obtained confession would most likely be inadmissible, can the converse be said? Would a confession be inadmissible if it is obtained as the result of an illegal seizure of physical evidence as where a confession is induced by the display to the accused of evidence illegally seized which

The above rules of procedure, as presently declared by the Indiana courts, are based upon the premise that all confessions are admissible if not involuntary. They are presumed to be voluntary until the accused has shown otherwise. In many situations these rules would now be inapplicable because of the recent *Escobedo* decision which makes the voluntariness of the confession irrelevant where the accused hac been denied the right to counsel. Thus, these rules of procedure would only be applicable where the accused has waived his right to counsel. In other words, it is only where there is such a waiver that the standard of voluntariness continues as controlling consideration.

CONCLUSION

Escobedo v. Illinois has already revolutionized the law of extrajudicial confessions. It appears that once the investigation has centered upon a person as the accused for the purpose of eliciting a confession from him, any extrajudicial confession given by him while without legal counsel can not be used in evidence against him even though it is voluntary unless the state can show that he intelligently waived his right to counsel. The subjective test of voluntariness as the standard for determining the admissibility of confessions is inapplicable unless at the time the confession is given either the investigation had not centered upon the defendant as the accused or he had waived his right to counsel. This seems to be a narrow area within which the standard of voluntariness remains operative.[141]

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incriminates him in the crime? The New York Court of Appeals has held that a confession so obtained is inadmissible under the United States Supreme Court decision in Mapp v. Ohio, 367 U.S. 643 (1961). The Court in People v. Rodriquez, 11 N.Y.2d 279, 183 N.E.2d 651 (1962) reasoned that Mapp v. Ohio renders inadmissible not only items obtained by illegal search or seizure, but any evidence which stems from their use. This decision appears to be a very broad extension of the doctrine of Mapp v. Ohio. It would not appear that the confession so obtained is a direct result of illegal search or seizure; it is at most an indirect consequence of illegal search or seizure.

141. It should be noted that the "Judges Rules" in England present an alternative to the complicated situation posed by Escobedo. Under these rules, statements of a person in police custody are inadmissible in evidence against him if made in response to questions put to him by police officials unless he has been properly cautioned. Before questioning a person the police must effectively warn him of his rights, such as his right to remain silent, and must caution him that anything he says will be reduced to writing and used in evidence against him. Under the "Judges Rules," police officials are also required to caution persons in their custody who wish to *volunteer* statements. These rules are much simpler and easier to enforce than the law under Escobedo. Under them it is unnecessary to determine whether the investigation has focused upon the person in custody as the accused for the purpose of eliciting a confession from him. In contrast to the Escobedo situation, there is no doubt under these rules whether a person in police custody must be advised of all of his constitutional rights. It is suggested that the "Judges Rules" are preferable to the complexities and uncertainties presented by the recent Escobedo decision. See 3 WIGMORE, EVIDENCE § 847 (3d ed. 1940) for a discussion of "Judges Rules."

The McNabb-Mallory rule may be applied to the states in the future.[142] However, such an extension of this rule may no longer be necessary for the protection of the accused due to the broad right to counsel given to him by *Escobedo*. The major evil of incommunicado detention is that the accused is isolated from all persons who might advise him as to his constitutional rights and provide him with moral support in his confrontation with police officials. Under *Escobedo* the accused has the right to consultation with legal counsel who will advise him of his right to silence and caution him to admit nothing. If a defendant is held in incommunicado detention, any confession obtained from him during such detention will be inadmissible under *Escobedo* because of the denial of his right to counsel.

The Indiana rule based on the standard of voluntariness, which puts upon the accused the burden of proving his confession inadmissible, has been vitiated except where there is knowledgable waiver making the voluntary standard still applicable. Now the burden of proof is upon the state. If the defendant was without legal counsel prior to his confession, the confession will be inadmissible unless the state can prove that the defendant waived his right to counsel. It further appears that the rule of the Indiana courts which admits in evidence admissions from an inadmissible confession and physical evidence obtained as result of information in the inadmissible confession, but not the confession *in toto*, is not consonant with the requirements of the due process of law in the fourteenth amendment.[143]

142. See note 72 *supra* and accompanying text.
143. See note 137 *supra* and accompanying text.